INDEX

Subject Index

PAGE

Statement of Case 1

Argument 5

Conclusion 12

Table of Cases Cited

Armour & Co. v. Wantock, 323 U. S. 126 ..... 5, 7

Bowers v. Remington Rand, Inc., 6 Wage Hour Cases 496 6

Bridgeman v. Ford, Bacon and Davis, 64 F. Supp. 1006 5, 6

Eustice v. Federal Cartridge Corporation, 66 F. Supp. 55 6

Harris v. Crossett Lumber Co., 62 F. Supp. 856 6

Jewell Ridge Corp. v. Local, 325 U. S. 161 7

Johnson v. Dierks Lumber and Coal Co., 130 F. 2d 115 6

Muldowney v. Seaberg Elevator Co., 39 F. Supp. 275 .. 6

Rokey v. Day and Zimmermann, Inc., 157 F. 2d 734 ... 6, 11

Seneca Coal and Coke Co. v. Lofton, 136 F. 2d 359 7

Skidmore v. Swift & Co., 323 U. S. 134 ..... 5, 7, 8, 9

Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590 .. 7

Whitsitt v. Enid Ice and Fuel Co., 5 Wage and Hour Reporter 636 7

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 993

VIRGIL D. BELL, et al.,
Petitioners,

v.

SETON PORTER, et al.,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF CASE.

This case involves the question of the validity, under the Fair Labor Standards Act of 1938, of the so-called "two-platoon" system in force in the fire department at the Elwood Ordnance Plant, Elwood, Illinois, during the period from February 27, 1944 to December 1, 1945.

The Elwood Ordnance Plant was a government-owned bomb and artillery shell loading plant operated by the respondents for the Government during the war years under a cost-plus-a-fixed-fee contract with the War Department (R. 372, 373). In 1943 the Army proposed that the respondents adopt in the Elwood fire department the two-platoon system which had been adopted previously at a

number of similar ordnance plants with the approval of the Wage and Hour Administrator (R. 374). The two-platoon system was a manpower conservation measure designed to alleviate the acute manpower shortage with which respondents and other war contractors were confronted (R. 142, 152, 266, 267).

The two-platoon system was proposed to the petitioners in the late summer of 1943 but did not meet with their approval at that time and they stated a number of objections to it, among which were lack of sleeping, cooking and eating facilities in the fire houses, indefinite arrangements as to wages and the like (R. 374, 289, 290). Prior to that time the fire department had been operated on a three-shift per day system under which the firemen on duty on each shift performed normal duties and were not permitted to sleep (R. 374). Hence, there had been no occasion to install sleeping dormitories, cooking and eating facilities and other accommodations needed under the two-platoon system. To meet the above mentioned objections the respondents caused a survey to be made as to the facilities necessary to be installed for the operation of the system (R. 141). This survey culminated in a detailed written plan outlining the facilities required and rates of pay and wages under the system (R. 314, 315). In December 1943 the matter was again proposed to the firemen at which time they voted unanimously, by written ballot, in favor of the adoption of the system (R. 374, 375). As indicated at page 16 of the petition the plan was proposed to the firemen on the basis that "the night hours would not be compensated." Fire Chief Mortenson testified that the written plan was read and explained to the firemen at the time of the vote (R. 153). The District Court in its findings of fact stated "the defendants testified that the Chief of the Fire Department fully explained the operation of the two-platoon system, the hours of work, rates of pay and facilities to be

furnished by them in the event of the adoption of the system, and that the firemen voted freely and without coercion in favor of the adoption of the plan" (R. 375). The purpose of the vote was to obtain the firemen's agreement to work under the system. Had a substantial number refused to agree upon this working arrangement the same would not have been adopted for fear of losing manpower and thus defeating the primary objective of the system (R. 142).

Prior to the inauguration of the two-platoon system the respondents sought and obtained through Army channels a written opinion dated February 4, 1944 from William R. McComb, Deputy Administrator, Wage and Hour and Public Contracts Division, U. S. Department of Labor, to the effect that the working arrangement as agreed upon between the firemen and the respondents "appears to be unobjectionable and will be considered by the Administrator as constituting a proper method of computing hours under the Act." This opinion was offered in evidence at the trial but was refused upon objection by petitioners' counsel as being irrelevant and immaterial to the issues (R. 142-149, 313). Upon the faith of this opinion and in accordance with the agreed plan, the respondents installed the necessary sleeping, eating and sanitary facilities and inaugurated the two-platoon system on February 27, 1944. The system was continued in effect until the respondents turned the plant back to the Army after the cessation of hostilities on December 1, 1945 (R. 375).

Under the two-platoon system each platoon of firemen remained on the premises on alternate days for 24 consecutive hours commencing at 7:30 A.M. The 16-hour period from 7:30 A.M. to 11:30 P.M. was considered working time. During this period about five hours were occupied with such duties as cleaning equipment, policing living quarters, testing hose, drilling and similar duties normally

assigned to firemen. The remaining portion of this period was spent in reading, listening to commercial radio programs, playing cards, horseshoes and baseball, cooking and eating meals and other personal activities. The firemen were free to retire in the sleeping dormitories at any time after 9 or 10 P.M., except that one man was required to remain awake in each station until 11:30 P.M. (R. 164, 296, 298).

The District Court found that after 11:30 P.M. all firemen were free to retire and no active duties were assigned to them, except when they were called out for night alarm duty (R. 378). Interruptions of the sleeping period by fire alarms were very infrequent. The total time spent on such duties by all firemen was only 136 hours out of a total of 108,720 sleeping period hours. Four firemen were never called out for such duty and the remainder spent from 30 minutes to 8 hours on such duty (R. 379).

The District Court also found that between 11:30 P.M. and 7:30 A.M. " a few of the plaintiffs were assigned actual duties to perform with respect to picking up laundry and driving dispatchers" (R. 378). The record discloses that such activities were insignificant in that they involved only 3 of the 53 firemen and a total elapsed time of less than three hours (R. 319).

In accordance with the agreed plan the petitioners were fully compensated for the hours between 7:30 A.M. and 11:30 P.M. but were not paid for the sleeping period hours between 11:30 P.M. and 7:30 A.M. except for the 136 hours aggregate time when they were called out to answer night alarms for which they were fully compensated. All hours worked in excess of forty per week were compensated for at one and one-half times the basic hourly rate of pay (R. 376).

Any saving in manpower or money attributable to the adoption of the two-platoon system accrued to the Government and not to the respondents for the reason that all labor costs at the plant were borne by the Government and respondents' compensation as contractor was a fixed fee not dependent upon savings effected in labor costs (R. 299-309).

The District Court concluded as a matter of law that the sleeping hours between 11:30 P. M. and 7:30 A. M. constituted compensable working time under the Act and entered a judgment in favor of petitioners aggregating $304,219.76, including liquidated damages and fees for petitioners' attorneys, and for costs of suit (R. 382).

The Circuit Court of Appeals reversed with instructions to dismiss the complaint (R. 420).

ARGUMENT.

In *Armour & Co.* v. *Wantock,* 323 U. S. 126, this Court considered and affirmed decisions of the District Court and Circuit Court of Appeals for the Seventh Circuit holding that, under the working arrangement and circumstances there presented, firemen's waiting time, *exclusive of sleeping and eating time,* constituted working time under the Act.

In *Skidmore* v. *Swift & Co.,* 323 U. S. 134, this Court reversed and remanded a decision holding that time spent by firemen on the employer's premises subject to call, including sleeping and eating time, was not working time under the Act for the reason that the decision below was based upon the erroneous proposition that such time, as a matter of law, may not be considered working time. Upon remand the lower court allowed recovery for the time spent in the fire station "less 8½ hours each night for sleeping, dressing and other private pursuits." See *Bridgeman* v.

Ford, Bacon and Davis (D. C. Ark. 1946) 64 F. Supp. 1006, 1014. The result of the *Armour* and *Skidmore* cases was, therefore, to deny recovery for time spent by the firemen in sleeping and eating in the fire stations subject to call in case of emergency and to permit recovery for all other "on call" time.

This case involves solely the question whether the eight-hour period when the firemen were asleep in the fire stations constitutes compensable working time. Under the agreed working arrangement all other time spent by the firemen on the premises was regarded as working time and they were fully compensated for it. Therefore, the result of the decision below is fully in accord with the results in *Armour* and *Skidmore*.

Without exception the identical two-platoon system adopted at many other ordnance plants, in each case with the prior approval of the Wage and Hour Administrator, has been upheld as meeting the requirements of the Act. *Bridgeman* v. *Ford, Bacon and Davis,* (D. C. E. D. Ark. 1946) 64 F. Supp. 1006; *Eustice* v. *Federal Cartridge Corporation* (D. C. Minn. 1946) 66 F. Supp. 55; *Bowers* v. *Remington Rand, Inc.* (CCA 7) 6 Wage-Hour Cases 496, No. 995 in this Court; *Rokey* v. *Day & Zimmermann, Inc.* (CCA 8), 157 F. 2d 734, No. 994 in this Court, and the case at bar.

In similar cases sleeping time of watchmen and porters subject to call in case of emergency also has been held not to constitute working time within the meaning of the Act. *Johnson* v. *Dierks Lumber and Coal Co.* (CCA 8) 130 F. 2d 115, 120; *Muldowney* v. *Seaberg Elevator Co.,* (D. C. N. Y. 1941) 39 F. Supp. 275; *Harris* v. *Crossett Lumber Co.,* (D. C. W. D. Ark. 1943) 62 F. Supp. 856.

It does not appear that the Circuit Court of Appeals for the Tenth Circuit had before it or considered the District Court's holding with respect to lunch periods in *Seneca Coal*

and Coke Co. v. *Lofton,* 136 F. 2d 359, cited by petitioners at page 12 of their petition. That case involved a question as to the applicability of the *Missel* formula (316 U. S. 572). It does not constitute a conflicting holding as to sleeping time under a two-platoon system.

The District Court's decision in *Whitsitt* v. *Enid Ice and Fuel Co.,* (D. C. W. D. Okla.) 5 Wage and Hour Reporter 636, cited by petitioners at page 13 of their petition, does not disclose fully the facts and circumstances surrounding the plaintiffs' employment and contains no discussion of the applicable authorities.

This Court has recognized that "borderline" cases involving doubt as to whether certain activity or nonactivity constitutes work or employment may be resolved by custom or contract between the parties. *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 603; *Jewell Ridge Corp.* v. *Local,* 325 U. S. 161, 169-170; *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Skidmore* v. *Swift & Co.,* 323 U. S. 134. Unlike the situations presented in the iron and coal mining cases, the hours spent in sleep in this case cannot be said to "partake of the very essence of work" (325 U. S. 161, 170). Rather, in common understanding time spent in sleep is the very antithesis of work. Even if it be assumed that time spent in sleeping on the employer's premises subject to call in case of emergency is not under the circumstances presented here excluded from the "workweek" as a matter of law, at the very least, an extremely "doubtful" or "borderline" question is presented as to whether such non-activity constitutes work. The unanimity of opinion among the courts which have considered the problem of sleeping time under the two-platoon system and the position of the Administrator serve to emphasize the grave doubt that such time may properly be regarded as working time. Hence, the agreement between the parties as to the sleeping period hours should prevail.

In the *Skidmore* case this Court said concerning such doubtful situations (323 U. S. 134, 137):

> "The law does not impose an arrangement upon the parties. It imposes upon the court the problem of finding what the arrangement was. We do not minimize the difficulty of such an inquiry where the arrangements of the parties have not contemplated the problem posed by the statute."

Here, however, the lower courts were presented with no such difficulty. The "problem posed by the statute" was considered prior to the inauguration of the two-platoon system and the same was adopted only after an opinion had been obtained from the Administrator approving the working arrangement agreed upon by the parties concerned as being a reasonable and proper method of computing working time under the Act (R. 313).

The two-platoon system was proposed to and discussed with the firemen on several occasions; they were informed that under the plan the sleeping period was not to be regarded as working time; they voted unanimously in favor of the adoption of the system; the respondents installed the required sleeping, cooking and other facilities called for by the approved plan; the Administrator's approval of the agreed arrangement was secured; the system was inaugurated and the firemen worked thereunder and received compensation computed in accordance therewith for a period of twenty-one months. These facts clearly establish an agreed working arrangement or contract between the parties which, in the light of the Administrator's specific approval, was in good faith assumed to settle any doubt as to whether time spent asleep in the fire station dormitories constituted working time.

The conclusion of law by the District Court that "the time spent by plaintiffs upon the premises of the defendants during the period between 11:30 P.M. and 7:30 A.M.

was predominantly for the benefit of the defendants" (R. 381) was obviously an erroneous conclusion based upon the mistaken conception that the mere presence of the firemen on the employer's premises is decisive of the case. This conclusion disregards the "doubtful" or "borderline" nature of the nonactivity of the firemen during the sleeping period and fails to take into account the agreement of the parties with respect thereto. The time was spent in sleeping and was free from assigned duties except in the event of infrequent alarms for which full compensation was paid. Sleep is necessarily for the benefit of the sleeper and is a "pursuit of a purely personal nature which would presumably occupy the employees' time whether on duty or not." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139. It is true the respondents realized some benefit from the availability of the firemen at the fire house during the sleeping period, and it was apparently the theory of the trial court that such availability alone was decisive. However, the availability of employees whether on or off the premises is always beneficial to any employer. Where, as here, employees are permitted to sleep and throughout the period in question did sleep with interruptions so infrequent (for which compensation was paid) as to be inconsequential, such a "borderline" or "doubtful" case is presented that the agreement of the parties should determine the outcome.

In this case the parties by their agreement upon the two-platoon system as a working arrangement mutually determined that the hours spent in sleep were not to be considered working time. As stated by the Circuit Court of Appeals (R. 419):

> "Appellees, in consideration of their employment as firemen, were willing to sleep on the premises and keep themselves available for duty if called upon during their rest period; their contract was to wait to be engaged . . ."

The court below in reversing the District Court properly gave effect to the agreed working arrangement or employment contract as controlling the "doubtful" or "borderline" situation presented.

Petitioners urge at pages 16 and 17 of the petition that the employment contract should not be regarded as controlling because of the "employer's use of coercive pressure" in connection with the firemen's vote on the adoption of the system. This characterization is utterly unfounded and similar argument was properly disregarded by the Circuit Court of Appeals. The District Court made no finding that the vote was subject to employer coercion or pressure. Petitioners' assertion is based upon the finding of the trial court that in connection with the voting on the two-platoon system the firemen were given to understand that anyone not voting for the plan would be transferred to another department in the plant or discharged. The trial court supported this finding by specific reference to the testimony of Fire Chief Mortenson, a witness for the defendants, and to the form of the ballot (R. 375).

But the testimony of Chief Mortenson utterly fails to support this conclusion. He testified he told the firemen that any not required after the adoption of the two-platoon system would be referred to the Personnel Department and given other jobs in the plant at equal or better pay (R. 153, 154). He specifically denied informing the firemen that any not voting in favor of the plan would be discharged (R. 154). Certainly there is nothing in the form of the ballot (R. 290) to support the conclusion that a discharge would follow a vote against the plan. Even if, contrary to the fact, it be assumed the firemen were advised that anyone voting against the plan would be transferred or discharged such cannot be considered to be "coercive pressure." The then existing manpower shortage disproves the character-

ization (R. 142, 152, 266, 267). This Court will take judicial notice of the fact that during the war years high-paying jobs were plentiful and employers were using every device conceivable to satisfy and retain their employees and to encourage new personnel to add themselves to the payroll. It was an employees' market during which economic pressure from fear of losing a job was non-existent.

Throughout their petition the petitioners have attempted to create the impression that the sleeping facilities were inadequate to afford normal rest. The record belies such argument. As was said by the Circuit Court of Appeals in its opinion, the District Court "did not find that the sleeping quarters were inadequate or of such a character that the men were unable to obtain normal rest" (R. 419). The facts demonstrate the facilities furnished were amply adequate to afford normal rest (R. 249-263). The firemen were permitted to retire at 9 or 10 P. M. (R. 164, 296, 298) although paid until 11:30 P. M. They slept in the dormitories for twenty-one months without once availing themselves of the privilege of complaining as to the working and sleeping conditions through the grievance procedure established by the employer for that purpose (R. 49, 62, 63, 83, 101, 121, 122, 293-295). Petitioners' assertion that if the trial court had regarded this issue as significant "it is plain he would have found the sleeping conditions inadequate" (Petition 13, 14) is purely speculative and in fact the trial court could have made no such finding on the record in this case. The following language of the court in *Rokey* v. *Day & Zimmermann,* is appropriate to the record here (157 F. 2d 734, 738):

> "There was no substantial evidence that eight hours of sleep every night were not afforded these employees to the same extent that sleep would have been available to those living in certain Metropolitan districts or near

industrial areas, or in their own homes, or at hotels or rooming houses. The Act does not contemplate that the court shall weigh individual susceptibilities to noises which result from night traffic."

CONCLUSION.

The decision of the Circuit Court of Appeals accords with the decisions of other courts which have considered the problem and correctly applies the principles enunciated in applicable decisions of this Court. Therefore no question requiring review by this Court is presented and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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